SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. [redacted] 105

DUQUESNE CLUB,

Petitioner,

vs.

HENRY D. BELL, AS FORMER ACTING COLLECTOR OF INTERNAL REVENUE.

No. [redacted] 106

DUQUESNE CLUB,

Petitioner,

vs.

WILLIAM D. DRISCOLL, AS COLLECTOR OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE B. FURMAN,
PAUL ARMITAGE,
EDWARD HOLLOWAY,
Counsel for Petitioner.

INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

Treasury Regulations.

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Appellant-Respondent.

PETITION OF DUQUESNE CLUB FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Duquesne Club, a Pennsylvania non-profit corporation, by its counsel respectfully prays that

Writs of Certiorari issue to the United States Circuit Court of Appeals for the Third Circuit to review its judgments entered April 13, 1942 which reversed final judgments in favor of the petitioner of the United States District Court for the Western District of Pennsylvania.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit was filed April 13, 1942 (R. 326). The opinion of the United States District Court for the Western District of Pennsylvania is found at 42 F. Sup. 123 (R. 301).

Jurisdiction.

The judgments of the United States Circuit Court of Appeals for the Third Circuit were entered April 13th, 1942 (R. 331-2). The jjurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

The Question Presented.

The question presented is not one of fact. The Trial Court found that, "the primary and predominant purpose of the Duquesne Club is a business club and any social features are incidental to this predominant purpose and are not material to its operation or existence." (R. 299). It found that "the business and professional men have come to look upon the club as a place in which to meet competitors and their business associates: and it is largely used for that purpose during the luncheon period." (R. 294).

The Circuit Court of Appeals specifically adopted these Findings of Fact (R. 326) but held that any "organization, whether incorporated or not, which provides an opportunity for its members to meet each other at meal times and partake together of food and drink with conversation

on whatever subject pleases them is a social organization" (R. 330), and taxable under Section 501 of the Revenue Act of 1926, as amended by Section 413, Rev. Act. 1928.

That court placed upon the term "social" in that statute a new and artificial meaning, contrary to its usual signification, saying that it was a "term of art, even though an elusive one." (R. 327).

The decision of the Circuit Court of Appeals is in conflict in this respect as a matter of law, with the decisions of the Circuit Courts of Appeal of the United States, for the First, Second and Third Circuits, including its own decision, as well as those of the District Courts and Court of Claims.

See:

Squantum Ass'n v. *Page,* 77 F. (2d) 918 (C. C. A. 1st Circuit);

Tidwell v. *Anderson,* 72 F. (2d) 684 (C. C. A. 2d);

Union Club of Pittsburgh v. *Heiner,* 99 F. (2) 259 (C. C. A. 3rd);

Krug v. *Rasquin,* 21 Fed. Supp. 866—Dist. Eastern District N. Y.;

Bankers Club of America, Inc., 37 F. (2d) 982, Ct. Cl.

Summary and Short Statement of the Matter Involved.

These two suits were brought against the respective Collectors of Internal Revenue for the refund of tax on club dues imposed under Sec. 501 of the Revenue Act of 1926, as amended by Sec. 413 of the Revenue Act of 1928, (now Sec. 1710 Int. Rev. Code). They were tried together by stipulation.

The period involved is from September 1, 1935, to July 1, 1938, and the respective amounts are the sums of $5,340.65 and $58,725.89. Claims for refund were duly filed and rejected and suit was brought in the District Court for the Western District of Pennsylvania.

The Trial Court found that the Petitioner was not a social club within the Act. It found in part:

> "The membership of the Club for many years has been composed of leaders in industry, finance and business of the City of Pittsburgh and surrounding territory. More than three-quarters of the members are executives of corporations located in and around Pittsburgh, representing some of the largest industries in the United States. It is the habit of long standing for men to meet at the Club at luncheon time to make contacts, exchange ideas, and have private conferences, directors' meeting, and other gatherings for the promotion of their business interests. The Club offers a place at which members can come for luncheon and a place where, if they desire, they can hold their meetings. The business and professional men have come to look upon the Club as a place in which to meet competitors and their business associates; and it is largely used for that purpose during the luncheon period. This habit and use of the Club has drawn together and maintains its membership. The building is equipped with the usual modern hotel conveniences for the members and guests. It also supplies rooms for overnight guests, when desired. The Club does not sponsor any social, sporting, or athletic activities (R. p. 293 a and 294 a).
>
> * * * The large number of private dining rooms maintained by the Club are provided for members engaged in, and representing large business and industries in and around Pittsburgh where they could discuss their business privately at lunch * * * (R. 294 a).
>
> * * * The bedrooms are maintained to further the business interests and convenience of the members and provide accommodations for out-of-town associates of business organizations to which the members belong (R. 295a).
>
> The Club does not sponsor or furnish any form of entertainment. There is no Entertainment Committee

or special entertainment provided by the by-laws of the Club (R. 295 a). * * * There is no dancing, no receptions, card parties, bridge parties, or anything of that kind. * * * The Club has no facilities for golf, handball, tennis, or any other sports, and has no reciprocal arrangements with any other Club. Most of the time after lunch there is seldom anyone to be seen around the Club, except the attendants. The Club is deserted on Sundays and holidays" (R. 296).

On these Findings and on the other detailed Findings which fully supported them, the *Trial Court* found:

(1) The primary and predominating purpose of the Duquesne Club is a business club, and any social features are incidental to this predominate purpose, and are not material to its operation or existence (R. 299).

(2) The Duquesne Club is not a social, athletic, or sporting club or organization within the meaning of Section 413 of the Revenue Act of 1928, c. 852, 45 Statutes 791 (R. 299).

and rendered judgment accordingly.

It therefore directed Judgment in favor of Plaintiffs for the refunds claimed.

On appeal by the defendants to the Circuit Court of Appeals for the Third Circuit, that Court accepted the Findings of Fact of the Trial Court as correct, but held upon these facts as matter of law that "the term 'social' when used in the statute imposing the tax necessarily becomes a term of art even though an elusive one" (R. 327); and that any organization or club which provides an opportunity for its members to meet each other at meal times and partake together of food and drink, no matter for what purpose, business or pleasure or what the subject of the conversation, is a social club within the Act. In short, that a business luncheon club maintained by business men

for business purposes is a social organization and taxable as such.

The Circuit Court reversed on the law the Judgments of the District Court on its construction of the Taxing Act.

Reasons Relied Upon for the Granting of a Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. Because a direct conflict exists between the decisions of the Circuit Court of Appeals for the Third Circuit, in this case, and decisions of the First Circuit, Second Circuit, and Third Circuit (its own decision).

2. Because a direct conflict exists between this decision of the Third Circuit Court and the decision of this Circuit Court unreversed, which is in harmony with those of other circuits.

3. Because the court below has rendered a decision in conflict with the decisions of the following Federal District and Circuit Courts of Appeal which hold that the predominant purpose and not the subordinate or incidental features, or the serving of food, determine its character and taxability under the Act. On comparable facts, business luncheon clubs were held to be not taxable in the following cases: *Union Club of Pittsburgh* v. *Heiner*, 99 F. (2d) 259, decided by the Circuit Court of Appeals for the Third Circuit; *Tidwell* v. *Anderson*, 72 F. (2d) 684, decided by the Circuit Court of Appeals for the Second Circuit; *Squantum Association* v. *Page*, 77 F. (2d) 918, decided by the Circuit Court of Appeals for the First Circuit; *Engineers' Club of Philadelphia* v. *U. S.*, U. S. District Court, Eastern District of Pennsylvania, 19 A. F. T. R. 1358; *Krug* v. *Rasquin*, 21 Fed. Supp. 866, U. S. District Court Eastern District of N. Y.

4. Because this case involves an important question of Federal Tax Law which affects and will continue to affect numerous taxpayers in the United States, to-wit, a construction of the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, and which has not been but should be settled by this Court.

5. Because there is a direct conflict between the decisions in the Third Circuit and the decisions in the other Circuits above-mentioned in the construction to be placed upon a Federal Tax Law (Section 501, Rev. Act of 1926) i. e., whether the word "social" as found therein shall be given the ordinary and common significance, or shall it be given an "elusive" or "artificial" meaning, contrary to the Regulations of the Treasury Department (See Appendix A), and the uniform decisions of all the other Circuits and Courts of the United States where the question has been presented, with the result that the law has been rendered indefinite, vague, confused and conflicting.

6. Because the decision of the Circuit Court of Appeals, in this case, placing upon the word "social" as found in the Federal Act in question, artificial and "elusive" meaning is in conflict with the well-settled decisions of this Court, that when the words used are plain and unambiguous they are to be given their ordinary signification, "and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti* v. *United States*, 242 U. S. 470, 490.

Statutes Involved.

The Statutes and Regulations involved are set forth in full in Appendix A.

WHEREFORE, your petitioner respectfully prays that Writs of Certiorari issue out of and under the seal of this Court,

directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the court to certify and send to this Court on a day to be designated, a full transcript of the Record and all proceedings of the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court, that the judgment of the Circuit Court of Appeals be reversed and that the judgments of the District Court be affirmed, and that your petitioner may be granted such other and further relief as may seem proper.

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Dated: Washington, May 29, 1942.

BRIEF IN SUPPORT OF PETITION.

The facts are sufficiently stated in the Petition but are set out in detail in the Findings of Fact of the Trial Court, R. 286-300, specifically adopted by the Circuit Court of Appeals in these words: "The facts we take from the Trial Court, but the conclusions upon them must be our own" (R. 327).

Specifications of Error.

The Circuit Court of Appeals erred

1. In holding that the word "social" shall be given an "elusive" or "artificial" meaning, contrary to the Regulations of the Treasury Department and the uniform decisions of all the other circuits and courts of the United States where the question has been presented, with the result that the Law has been rendered indefinite, vague, confused and conflicting.

2. In holding what while the Petitioner was a business luncheon club maintained by business men to meet and discuss their business matters, that that was its predominant purpose and that it had no social activities but was still taxable as a "social club" under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

3. In holding that a luncheon club no matter by whom or for what purpose maintained or what type of matters discussed or handled, was necessarily "social" within said Act.

ARGUMENT.

Point I.

There is a direct conflict between the Circuit Court of Appeals in its decision in this case and the decisions of the first, second and third (its own decisions), as to the

construction of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

As already pointed out the court below held that the word "social" as used in said Act was a "term of art" although an "elusive" one and therefore should be given an elusive or artificial meaning, and hence arbitrarily held that any luncheon club, no matter by whom maintained, for what purposes, or what its social activities are, is a "social club" within the taxing Act.

This decision was in direct conflict with the following decisions where it was decided by other Circuit Courts of Appeals that such luncheon clubs when maintained by business men for business purposes were not taxable even though they had incidental social activities.

For example the decision of the Third Circuit below is in conflict with the following decisions:

Squantum Association v. *Page,* 77 F. (2d) 918; C. C. A., 1st Circuit.

Tidwell v. *Anderson,* 72 F. (2d) 684; C. C. A., 2d Circuit.

Union Club of Pittsburgh v. *Heiner,* 99 F. (2d) 259; C. C. A., 3d Circuit.

For the convenience of the Court we quote pertinent extracts from some of the opinions.

This decision is in conflict with this Third Circuit's prior decision in the *Union Club* case, 99 F. (2d) 259; a business luncheon club similar in all respects to the case at bar. The Circuit Court of Appeals said in the *Union Club* case, *supra,*

> "What are the predominant features of the Union Club? Is it social relaxation or business activity supported and paid for by business companies for business purposes? * * *
>
> "* * * Turning then, to the questions involved as above indicated, we find at the outset a business pur-

pose and practice, namely, that this was not a club of individuals who sought membership for social purposes but a Club supported and paid for by business corporations for business purposes * * *.

"* * * The record fails completely to establish that the continued habit of its members and general and established conduct of its membership indicate any other purpose than to set up and maintain a central place where at the noon hour business men could in business hours meet business men for business purposes."

The Court overruled that case, saying

"The learned trial Judge naturally relied for guidance upon the decision of this Court in Union Club of Pittsburgh *v.* Heiner, 99 Fed. (2d) 259 (C. C. A. 3, 1938). This Court as at present constituted does not agree with the view expressed in the majority opinion in that case and it may be regarded as overruled."

A.

This decision is in conflict with the decision of the Court of Claims, *Whitehall Lunch Club* v. *U. S.*, 9 Fed. Supp. 132, which held the club a business luncheon non-taxable and where that Court approved its official Commissioner's findings. We quote from that decision:

"The predominant activity of the club was the serving of lunches to its members and their guests in such manner as to enable them to come into desired contact with others in a business and professional way, and the club could not have existed without this being done, but on the whole neither the social features nor the gymnasium facilities considered separately, or both taken together, existed in a degree to make them anything more than incidental to the predominant activity of the club, as above set forth."

And the decision in *Bankers' Club of America, Inc.*, v. *U. S.*, 37 Fed. (2d) 982, solely a business luncheon club

with no other facilities, which held the club non-taxable and where Judge Booth said:

> "* * * Nevertheless the record herein fails completely to establish that the continued habits of its membership and the general and established conduct of its management indicate any other purpose than to set up and maintain a central meeting place for men of means to have their luncheon and discuss during the noon hour the affairs with which they are concerned. Neither the Taxing Act nor the Regulations of the Bureau discriminate between an imposing organization and one less ornate and attractive. The issue is the purpose of the club, and, if it falls within the class specifically pointed out by the Act and the Regulations as exempt from taxation, we cannot refuse to so hold, especially so when there exists no proof of any probative worth to the contrary.
>
> "The case, it seems to us, comes within the decision of this Court in the following cases: Aldine Club *v.* United States, 65 Ct. Cl. 315, and Chemists' Club *v.* United States, 64 Ct. Cl. 156."

B.

This decision is in conflict with the decision of the Court of Appeals of the First Circuit in *Page* v. *Squantum Assn.*, 77 F. (2d) 918, which only served lunches but was held non-taxable. Judge Bingham said:

> "The District Court (7 F. Supp. 815, 818) found that 'the main purposes and activities of the club were * * * the serving of food, and * * * that the social aspects were merely incidental thereto.' Having found these facts, among others, it ruled that it was not a social club or organization within the meaning of Section 501 of the Revenue Act of 1926 (26 U. S. C. A. Section 872 note) and Section 413 (a) of the Revenue Act of 1928 (26 U. S. C. A. Sec. 873). See Regulations 43, Arts. 35 and 36.

In view of the facts found we think the ruling was correct, and the judgment of the District Court should be affirmed."

C.

This decision is in conflict with the decision of the Court of Appeals of the Second Circuit in *Tidwell* v. *Anderson,* 72 Fed. (2d) 684, a business club involving service of luncheons, where Judge Chase said:

"(1) The test of taxability is not whether a club has any social features at all, but whether or not such activities, viewed, of course, in the light of all the circumstances of its existence, including the declared purpose of the organization as shown by its constitution and by-laws, if their provisions are enforced, are what in fact provide the real reason for its existence and enable it to secure members and retain them. Another way to put the problem is 'whether the social features of the club involved are merely incidental or whether, on the other hand, they are a material purpose of the organization.' Union League Club of Chicago *v.* United States, supra.

"9. The principal meal is luncheon, when it is customary for groups from a single department of the University or professionally occupied on a single subject to sit at the same tables, so as there to discuss or dispose of University matters of mutual concern."

Again, the decision of the Circuit Court of Appeals in the Third Circuit, in this case, is in conflict with its own construction of the Act in the *Union Club of Pittsburgh* v. *Heiner,* in which Judge Buffington said:

"In determining that question (whether the taxpayer was in operation a social club and as such subject to taxation, or was in operation a business luncheon club and therefore not subject to taxation) the weight of authority indicates the test is whether in its actual working business was an incident to social, or social features incidental to business."

D.

Likewise, it is in conflict with the following decisions in other Circuits and other Courts:

The rule laid down by Judge Caffey in the District Court in *Tidwell* v. *Anderson,* 4 F. Supp. 789, states:

> (TO RENDER CLUB DUES TAXABLE ON GROUND CLUB IS SOCIAL CLUB, SOCIAL FEATURES MUST BE MATERIAL PURPOSE OF ITS ORGANIZATION.) "Under foregoing rule, if social features are subordinate and merely incidental to real and primary pursuit of something other than social features, that is, if there be active furtherance of something different from social features, and if that different thing be the predominant purpose of the organization, then the social features are not a material purpose. Although social features may be a purpose, that purpose cannot be treated as material if it be but an unsubstantial portion of the whole set or purposes for which the club is carried on."

The Court of Claims said in the *Army and Navy Club* v. *U. S.,* 53 F. (2d) 277,

> "if the predominant purpose of the organization is not social, and its social activities are merely incidental to the furtherance of this different and predominant purpose, then the Club is not a social one within the law."

And again, in the *Chemists Club* v. *U. S.,* 64 Ct. Cl. 156:

> "Where the predominant purpose of the organization is the accomplishment of something in religion, the arts or business, it is not a social club, notwithstanding it provides incidentally means of social intercourse."

In the *Engineers' Club of Philadelphia* v. *U. S.* (Di. Ct., E. D. Penna., C. C. H. 1937 to Vol. 4, Par. 9478):

> "I cannot, however, agree with the defendant that the question is whether or not a material part of the club *activities* are of a social nature. If that were so, there would be very few clubs which would escape taxation and most of the reported cases would have been differently decided. The question is whether the social features are a material *purpose* of the club. They may be a material part of its activities and still be subordinate and merely incidental to the main purpose. * * * For the purposes of this case I have accepted the Regulations themselves as an authoritative interpretation of the Act and as supplying a fair and reasonable test."

The Circuit Court of Appeals recognized the confused state of the law in these words (we quote from its decision (R. 330):

> "The decisions which have dealt with the application of this statute present a rather confused picture, due perhaps to the necessarily vague character of the concept, for tax purposes, of what is social.",

casting doubt upon a long line of decisions by using these words (R. 330);

> "Some others seem to us to go pretty far in what a group of people must do together in order that their activities be called social."

Citing the following cases, which are fundamentally in conflict with their own:

Page v. *Squantum Assn.*, 77 F. (2d) 918 (C. C. A. 1, 1935), affirming 7 F. Supp. 815 (D. R. I. 1934);
Tidwell v. *Anderson*, 72 F. (2d) 684 (C. C. A. 2, 1934);
Whitehall Lunch Club v. *U. S.*, 9 F. Supp. 132 (Ct. Cl. 1934);
The Cordon v. *U. S.*, 46 F. (2d) 719 (Ct. Cl. 1931);
Bankers' Club of America, Inc., v. *U. S.*, 37 F. (2d) 982 (Ct. Cl. 1930).

It brings into relief the uncertainty and confusion precipitated in the law to cite the predicament of the Trial Judge, Judge Schoonmaker. He had decided the case of the *Union Club of Pittsburgh*. In his opinion, it was a social club, even though its activities consisted in providing luncheons and other facilities for a group of business men. This same Circuit Court of Appeals in the Third Circuit promptly reversed him.

When the Duquesne Club, the case at bar, came before Judge Schoonmaker, acting as he was bound to do, followed that decision and held that the *Duquesne* case, under identical facts, was not a social club and therefore not taxable.

Again, the same Circuit Court of Appeals, on the same facts but on a different conclusion of law, promptly reversed him. It will be difficult to know what rule of law the District Court Judge will follow when a similar case comes before him.

Point II.

The decision of the Circuit Court of Appeals for the Third Circuit in this case has placed a construction upon a Federal statute, to wit, Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, which is in conflict with its own decisions and that of all the other Circuit Courts of Appeal where the question has been presented, thus rendering the law confused, uncertain and doubtful.

The legal question involved is what construction is to be placed on the words "social club" in Section 501 of the Revenue Act of 1926 as amended by Section 413 of the Revenue Act of 1928. Are the words to be given their "ordinary and natural sense"?

The Circuit Court of Appeals in the instant case held, contrary to all the other Circuits that "the term 'social' "

when used in the Statute imposing a tax necessarily becomes a "term of art, even though an elusive one", and having placed upon the word "social" this fantastic definition, they proceeded to hold that any business luncheon club, even though maintained by business men to further business interests, and with negligible other social activities, was necessarily a "social club" within this "elusive" term of art.

This construction placed upon the word "social" by the Circuit Court of Appeals, we assert, is contrary to the well settled decisions of the Supreme Court, holding that:

> "Language used in tax statutes should be read in the ordinary and natural sense; in the common and usual meaning of the term."
>
> *Helvering* v. *San Joaquin Co.*, 297 U. S. 499;
> *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552;
> *Reinecke* v. *Smith*, 289 U. S. 172.

The error committed by the Third Circuit is that it has gone contrary to the well settled rule of this Court that:

> "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."
>
> *Caminetti* v. *United States*, 242 U. S. 470, 490.

Point III.

The decision of the Circuit Court of Appeals for the Third Circuit in this case is in conflict with the regulations issued by the Commissioner under the statute and the settled practice of the Bureau.

The Statute taxing "fees of any social, athletic or sporting club or organization" came into the law in 1917 and has been repeatedly reenacted in the subsequent Revenue Acts of 1918, 1921, 1924, 1926 and 1928, in the same words.

Under the original Act and subsequent Acts, the Treasury issued Regulations 43 construing it. In these it undertook (Articles 35 and 36, Appendix A) to define a social club or organization, and was careful to point out that not all clubs having incidental social activities came within the Act. These original Regulations stated that if the Club had a predominant non-social purpose, "such as, for example, religion, arts, or business" the mere existence of social features "subordinate and merely incidental to the active furtherance of a different and predominant purpose did not render it taxable under the Act".

These Regulations make it plain that social features which are "subordinate and merely incidental to the active furtherance of a different and predominant purpose" (Art. 36) (Appendix A) do not render a non-social club taxable. It must be established and shown either that the social features are the predominant purpose of the club, that is, that the social features are "so materially interwoven into the entire fabric of the club that without them the club could not exist", and that they became a material purpose (*Transportation Club of San Francisco*, Ct. Cl., 17 Fed. Supp. 201).

Since these Regulations were adopted, the Act has been repeatedly re-enacted by Congress, without change of words.

Under settled decisions this is the legislative adoption of the Treasury Department's contruction of the Act, and gives to the Regulations the force and effect of Statutes:

Brewster v. *Gage*, 280 U. S. 327, 337;
National Lead Co. v. *U. S.*, 252 U. S. 140, 147;
U. S. v. *Bailey*, 9 Pet. 238, 256;
Town Club of St. Louis, 68 F. (2d) 620;
Provost, et al. v. *U. S.*, 269 U. S. 443;
U. S. v. *Falk & Bro.*, 204 U. S. 143;
U. S. v. *Hermanos*, 209 U. S. 337.

Conclusion.

Wherefore, your petitioner respectfully presents that this case is one of gravity, importance, and of general public interest, and prays that a Writ of Certiorari be issued out of and under the seal of this court, directed to the Circuit Court of Appeals, Third Circuit, commanding said Court to certify and send to this court on the date to be designated in said Writ, full and complete record of all proceedings in said Circuit Court of Appeals in this case, to the end that said case may be reviewed and determined by this court, as provided by law.

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APPENDIX A.

Statute and Regulations Involved.

Revenue Act of 1928, c. 852, 45 Stat. 791;
Sec. 413. Club Dues Tax.

(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"Sec. 501 (s) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25. per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10. or if the dues or membership fees, not including initiation fees of an active resident annual member are in excess of $25. per year.

* * * * * * *

Treasury Regulations 43, promulgated under the Revenue Acts of 1926 and 1928 (revised October, 1928):

Art. 35. *Determination of Character of Club.*—The purposes and activities of a club and *not its name* determine its character for the purpose of the tax. Every club or organization having social, athletic, or sporting features is presumed to be included within the meaning of the phrase, "any social, athletic, or sporting club or organization", until the contrary has been proved, and the burden of proof is upon it. Every such club or organization, therefore, unless it falls within the express exemption of the act (See Art. 38), must collect, return, and pay over the tax imposed by the act, unless and until it has satisfied the Commissioner of Internal Revenue that it is not in fact, "social, athletic, or sporting" within the meaning of the act as defined in these regulations. If any such club or organization claims that it is not in fact, "social, athletic,

or sporting," it shall submit to the collector its charter or constitution and by-laws, together with a statement showing its actual purposes, activities, practices, and facilities, the character of its expenditures, and such other evidence as may be requested. Upon consideration of the evidence submitted the collector will determine, if he can do so, whether or not such club or organization is included within the provisions of the act. If, however, the collector is in doubt as to whether or not the club or organization is "social, athletic, or sporting," he will refer the statement and accompanying papers to the commissioner for decision. When a club or organization has been held not to be a "social, athletic or sporting" club or organization it need not thereafter make a return or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purposes for which it was originally created. Collectors will keep a list of all clubs or organizations held not to be "social, athletic, or sporting", clubs or organizations, to the end that they may occasionally inquire into their status and ascertain whether or not they are observing the conditions upon which their exemption is predicated. If the collector decides that the club or organization is included within the provisions of the act and the club or organization is not satisfied with his decision, it may request that the matter be referred to the Commissioner of Internal Revenue at Washington for a ruling.

Art. 36. *Social Clubs.*—Any organization which maintains quarters or arranges periodical dinners or meetings for the purpose of affording its members an opportunity of congregating for social intercourse, is a "social * * * club or organization" within the meaning of the act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as for example, religion, the arts, or business. *The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features,* but, if the social features are a material

purpose of the organization, then it is a "social * * * club or organization" within the meaning of the act. *An organization that has for its exclusive or predominant purpose religion or philanthropic social service* (or the advancement of the business or commercial interests of a city or community) *is clearly not a "social * * * club or organization"*. Most fraternal organizations are in effect social clubs, but if they are operating under the lodge system or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt.

INDEX

CITATIONS

467942—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 105

DUQUESNE CLUB, PETITIONER

v.

HENRY D. BELL, AS FORMER ACTING COLLECTOR OF INTERNAL REVENUE

No. 106

DUQUESNE CLUB, PETITIONER

v.

WILLIAM D. DRISCOLL, AS COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (R.

289a–308a) is reported in 42 F. Supp. 123. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 326–331) is reported in 127 F. (2d) 363.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 13, 1942 (R. 331–332). The petition for writs of certiorari was filed June 5, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether during the period September 1, 1935, to July 1, 1938, the Duquesne Club was a "social" club within the meaning of Section 501 of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 413 of the Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—
>
> (1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

The regulations involved are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

The Duquesne Club, petitioner, instituted these actions in the District Court of the United States for the Western District of Pennsylvania to recover taxes paid on dues and initiation fees of its members for the periods from September 1, 1935, to March 1, 1936, and from the latter date to July 1, 1938, respectively. The cases were consolidated for trial pursuant to stipulation and were heard without a jury. The facts as found by the District Court may be summarized as follows:

The Duquesne Club is a non-profit corporation organized under the laws of Pennsylvania, its purpose, as outlined in its charter, being "the maintenance of a club for social enjoyment." It is located in Pittsburgh in the heart of the business and shopping districts. Its physical property consists of two adjoining buildings, the older of which is a five-story building and the other a modern twelve-story building. On the first floor are located a front lounge, front office, telephone room, billiard

and pool room having six pool and three billiard tables, cigar counter, check and wash rooms, and a hallway with two or three stock tickers. In the rear of this floor there is another lounge, which is seldom used, and a bar. Private and other dining rooms, of which there are altogether forty-four with a total seating capacity of over 1,200 persons, quarters for the management, service facilities, two bars, a barber shop, and several rooms used by the Club's "health department" occupy most of the next six floors. Sixty-five bedrooms are on the remaining floors, except the twelfth, which is used for storage. The "health department," where seven attendants are on duty from 9:00 A. M. until midnight, includes an exercise room for light calisthenics, massage room, steam room, baths, and doctor's office. But, apart from the billiard and pool room and a room where four card tables are provided, the Club affords no sport or recreational facilities. (R. 291a–293a, 294a–298a.)

Membership in the Club is open to males of legal age upon election by the Committee on Admissions and payment of an initiation fee of $500 in the case of active members and of $200 in the case of inactive members. Dues for active members are $185 per year and for inactive $92.50. During the period involved the membership averaged between sixteen and seventeen hundred. The membership is composed largely of executives of corporations from in or around Pittsburgh, but judges, educa-

tors, ministers, and others also belong.[1] R. 293a–294a.)

The Club does not sponsor any social, sporting, or athletic activities. It is primarily a club where members and their men guests meet to eat lunch, make contacts, exchange ideas, and have private conferences, directors' meetings, and other gatherings for the promotion of their business interests. Business and professional men have come to look upon the Club as a place in which to meet competitors and their business associates; and it is largely used for that purpose during the luncheon period. This use of the Club has drawn together and maintains its membership. The bedrooms are maintained to further the business interests and convenience of the members and to provide accommodations for out-of-town associates of business organizations to which the members belong. Breakfasts and dinners are served at the Club, but luncheons comprise eighty-five percent of the total meals. Ladies are not permitted in any of the Club's rooms on days other than New Year's Day, except that wives and daughters of members may use one of the dining rooms. (R. 294a–296a.)

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[1] As of December 27, 1939, the membership consisted of: 11 accountants, 164 attorneys, 76 bankers, 50 brokers, 745 corporation executives, 11 educators, 53 engineers and architects, 10 financiers, 57 insurance agents, 4 judges, 5 ministers, 25 physicians and dentists, 17 public officials, 23 real estate agents, 38 retired persons, one who had no occupation, and 5 whose occupations were unknown (R. 153a–155a).

During the respective fiscal years ending March 31, 1936, 1937, and 1938, the gross income of the Club from all sources aggregated $689,584.74, $708,095.70, and $733,195.49 (R. 299a).

The District Court concluded as a matter of law that the primary and predominating purpose of the Club is a business club, that any social features are incidental to this predominant purpose and not material to the Club's operation or existence, and that, therefore, the Club is not a social, athletic, or sporting club or organization within the meaning of Section 413 of the Revenue Act of 1928, as amended (R. 299a). The District Court, as appears from its opinion (R. 303a), relied primarily on the decision of the court below in *Union Club of Pittsburgh* v. *Heiner,* 99 F. (2d) 259, and declined to follow that of the Court of Claims in *Duquesne Club* v. *United States,* 23 F. Supp. 781, certiorari denied, 306 U. S. 649, which held that during a prior period (June 1929 to August 1935) petitioner was a social club within the meaning of the statute. Accordingly, it entered judgment for the petitioner in each case (R. 309a, 310a).

The court below reversed the judgments and in its opinion expressly overruled its decision in the *Union Club* case (R. 330, 331).

ARGUMENT

The decision of the court below is clearly correct. Under the test set forth in the applicable

regulations (Appendix, *infra,* pp. 10–12), adopted by the courts, and not disputed by petitioner, the purposes and activities of a club determine its character and, even if those are not predominantly social, the club is taxable as a social club if social features are a material and not merely an incidental part of its functions. See *Army and Navy Club of America* v. *United States,* 53 F. (2d) 277 (C. Cls.), certiorari denied, 285 U. S. 548; *The Lambs* v. *United States,* 8 F. Supp. 737 (C. Cls.), certiorari denied, 297 U. S. 713; *Engineer's Club of Philadelphia* v. *United States,* 42 F. Supp. 182 (C. Cls.), certiorari denied June 1, 1942, No. 1201, October Term, 1941, petition for rehearing filed June 19, 1942.

The predominant purpose of the Duquesne Club is plainly social, since, as is evident from the District Court's findings of fact, it is to provide its members a place to meet and have lunch with each other and discuss whatever subjects they may desire. The fact that the members use the Club as a place in which to discuss their business affairs and make business contacts does not alter its character as a social organization. The Club itself conducts no business. It was chartered for purposes of "social enjoyment" and its members, coming from various walks of life, pursue no common enterprise through the Club.

In any event, moreover, as was indicated by the court below (R. 329–330), even if the use of the Duquesne Club by its members for their individual business purposes were assumed to render the Club predominantly non-social, there is no proof that the social aspects of the luncheons and other activities during the period in question were only incidental features. The Court of Claims found in the earlier case involving the Club that its social features, including pool and billiard room, card tables, bars, lounges, bedrooms, and health department, were material to its operation and existence, and on that ground held it taxable. *Duquesne Club* v. *United States, supra.* Although the present case involves a succeeding period, the facts are substantially identical.

Petitioner asserts (Pet. 3, 6, 10–15) that the decision of the court below conflicts with the decisions of the Court of Claims in *Whitehall Lunch Club* v. *United States,* 9 F. Supp. 132, and *Bankers' Club of America, Inc.* v. *United States,* 37 F. (2d) 982, where comparable businessmen's lunch clubs were held to be not social, and with the decisions of several other courts.[2] Conflicts with all of the same decisions, except that in the

[2] *Page* v. *Squantum Ass'n,* 77 F. (2d) 918 (C. C. A. 1); *Tidwell* v. *Anderson,* 72 F. (2d) 684 (C. C. A. 2); *Union Club of Pittsburgh* v. *Heiner,* 99 F. (2d) 259 (C. C. A. 3) (overruled in the instant case); *Krug* v. *Rasquin,* 21 F. Supp. 866 (E. D. N. Y.).

Whitehall Lunch Club case, were relied on in the petition (pp. 4–5) for writ of certiorari filed by petitioner in the earlier case and denied by this Court (306 U. S. 649, No. 635, October Term, 1938). Each case necessarily turns on its own particular facts and insofar as the *Whitehall Lunch Club* and *Bankers' Club* decisions appear to be in conflict with the decision herein they must be viewed in the light of the subsequent decisions of the Court of Claims in the *Duquesne Club* and *Engineers Club* cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
Special Assistants to the Attorney General.

JUNE 1942.

APPENDIX

Treasury Regulations 43, promulgated under the Revenue Act of 1926 and 1928 (revised October, 1928):

ART. 35. *Determination of character of club.*—The act includes not only "clubs" but also "organizations" of a social, athletic, or sporting character. The purposes and activities of a club and *not its name* determine its character for the purpose of the tax. Every club or organization having social, athletic, or sporting features is presumed to be included within the meaning of the phrase, "any social, athletic, or sporting club or organization," until the contrary has been proved, and the burden of proof is upon it. Every such club or organization, therefore, unless it falls within the express exemption of the act (see art. 38), must collect, return, and pay over the tax imposed by the act, unless and until it has satisfied the Commissioner of Internal Revenue that it is not in fact "social, athletic, or sporting" within the meaning of the act and as defined in these regulations. If any such club or organization claims that it is not in fact "social, athletic, or sporting," it shall submit to the collector its charter or constitution and bylaws, together with a statement showing its actual purposes, activities, practices, and facilities, the character of its expenditures, and such other evidence as may be requested. Upon consideration of the evidence submitted the collector

will determine, if he can do so, whether or not such club or organization is included within the provisions of the act. If, however, the collector is in doubt as to whether or not the club or organization is "social, athletic, or sporting," he will refer the statement and accompanying papers to the commissioner for decision. When a club or organization has been held not to be a "social, athletic, or sporting" club or organization it need not thereafter make a return or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purpose for which it was originally created. Collectors will keep a list of all clubs or organizations held not to be "social, athletic, or sporting" clubs or organizations, to the end that they may occasionally inquire into their status and ascertain whether or not they are observing the conditions upon which their exemption is predicated. If the collector decides that the club or organization is included within the provisions of the act and the club or organization is not satisfied with his decision, it may request that the matter be referred to the Commissioner of Internal Revenue at Washington for a ruling.

ART. 36. *Social clubs.*—Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a "social * * * club or organization" within the meaning of the act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and pre-

dominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but, if the social features are a material purpose of the organization, then it is a "social * * * club or organization" within the meaning of the act. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a "social * * * club or organization." Most fraternal organizations are in effect social clubs, but if they are operating under the lodge system, or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

24

IN THE

Supreme Court of the United States

No. 105.

DUQUESNE CLUB, *Petitioner*,

against

HENRY D. BELL, as Former Acting Collector of Internal Revenue.

No. 106.

DUQUESNE CLUB, *Petitioner*,

against

WILLIAM D. DRISCOLL, as Collector of Internal Revenue.

REPLY BRIEF.

DUQUESNE CLUB,

By GEORGE B. FURMAN,
1316 L Street, N. W.,
Washington, D. C.

PAUL ARMITAGE,
EDWARD HOLLOWAY,
New York, N. Y.,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF.

Respondent's Counsel in his brief misstates the question presented on this application.

The Trial Court found:

> "The primary and predominant purpose of the Duquesne Club is a business club and any social features are incidental to this predominate purpose, and are not material to its operation or existence." (R. 299)

And also found that:

> "The business and professional men have come to look upon the club as a place in which to meet competitors and their business associates and it is largely used for that purpose during the luncheon period." (R. 294)

Respondent's Counsel asserts:

> "The predominant purpose of the Duquesne Club is plainly social (p. 7) * * * There is no proof that the social aspects of the lunches and other activities * * * were only incidental features" (p. 8) * * * and that "each case necessarily turns on its own particular facts." (p. 9)

These assertions completely ignore the Findings of the Trial Court adopted by the Circuit Court of Appeals, that:

> "The primary and predominant purpose of the Duquesne Club is a business club, and any social features are incidental to this predominate purpose, and are not material to its operation or existence." (R. 299)

With the finding of a fact fully supported by the evidence and adopted by the Circuit Court of Appeals, there was no question of fact presented or decided by the Circuit Court, and certainly not the fact asserted by Respondent's Counsel, but the contrary. What the Trial Court held was, that a business luncheon club whose primary and predominant purpose was a place where its business and professional members could meet "competitors and their business associates" (R. 294) with social features not material to this purpose and use, was a nonsocial club within the statute and not taxable.

The Circuit Court of Appeals intended to and did enunciate a new rule of law. It gave an enlarged and strange meaning to the word *social* in the Act. It intended to overrule the uniform line of cases of the other Circuits holding that a luncheon club maintained by business men for that purpose with social features, merely incidental and not material, was not taxable. That it intended so to do is shown, not only by its plain words but by its express overruling of the *Union Club* case, 99 F. (2nd) 259 (C. C. A. 3 1938) (R. 330) in which that Court had laid down a contrary rule of law and held that a club maintained by busi-

ness men for business luncheons was not social and not taxable under the Act.

That the Commissioner of Internal Revenue asserts that the Circuit Court of Appeals has enunciated a new rule of law is shown by the fact that he is seeking to reopen and tax under this case, all of the old cases wherein the Courts have decided that a business men's luncheon club maintained by business men to further their business interests, were non-taxable.

Petitioner's Counsel has received numerous requests for the record and decision in this case from attorneys and representatives of other Clubs formerly held non-taxable as business luncheon clubs, because the Treasury Department is now claiming that this decisive blow overrules all of the prior decisions in those club cases and requires a reopening of the same and a different principle of law applied thereto.

These facts not only show how the decision in this case is being construed by the Commissioner of Internal Revenue as one of law but also supports the point in our main brief (pp. 16, 17) that this decision has rendered the law "confused, uncertain and doubtful." Unless this Court determines this conflict the law will be left confused and indefinite, and a mass of litigation will result, because the cases are in other than the Third Circuit, and the Courts in those Circuits will follow their own decisions and not the Third Circuit, in conflict.

Respondent's Counsel in his brief seeks to avoid this direct conflict on a question of law and the construction of a Federal Statute between the Circuit Court's decision in this case and its prior decision in the *Union Club* case (supra) and the long line of decisions and the Regulations to the contrary, by asserting that each case necessarily turns on its own particular facts and that all that was presented and decided here was a question of fact, i.e., was the Club social or business? (Resp. brief p. 9.)

The Circuit Court of Appeals below specifically adopted these findings of fact (R. 289-299) but placed upon the term *social* in the Statute a new and artificial meaning, contrary

to its usual signification, saying that it was a "term of art even though an elusive one" (R. 327) and held as a matter of law that:

> "An organization, whether incorporated or not, which provides an opportunity for its members to meet each other at mealtimes and partake together of food and drink with conversation on whatever subject pleases them is a social organization" (R. 330).

This is not a finding of fact but a construction of the law, and holds that in spite of the facts found, that the predominating purpose of the Club is "business" (R. 294) and that the social features are not material to its existence, (R. 295) the Club being a business luncheon club is, *by law*, taxable. This is contrary to the Regulations, a long line of Circuit Court of Appeal decisions (see our main brief pp. 11-18) and to the Circuit Court's own decision in the *Union Club* case, *supra*, which it expressly overrules (see our main brief pp. 10-11). If it be a mere question of fact in each case, whether the Club is business or social—how could the Court overrule the *Union Club* case, *supra*,—a different Club?

Respondent's Counsel, in an endeavor to confuse the issue and create an illusion that the case involves merely a fact question, directed his argument to the activities of the Club and the comparison between activities there and the activities of other clubs. He fails entirely to meet the decision of the Circuit Court of Appeals which holds that any luncheon club is a social organization, which is in direct conflict with its prior decisions, and the decisions of the Circuit Court of Appeals of the Second and First Circuits (*Tidwell* v. *Anderson*, 72 F. (2d) 684, C. C. A. 2 and *Squantum Association* v. *Page*, 77 F. (2d) 918 C. C. A. 1) which held that a luncheon club could be a business club and therefore exempt.

WHEREFORE, your Petitioner's prayer for a Writ of Certiorari should be granted.

DUQUESNE CLUB,

By GEORGE B. FURMAN,
1316 L Street, N. W.,
Washington, D. C.

PAUL ARMITAGE,
EDWARD HOLLOWAY,
New York, N. Y.,

Counsel for Petitioner.

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PETITION FOR RECONSIDERATION of the PETITION FOR WRIT OF CERTIORARI.

DUQUESNE CLUB,

By GEORGE B. FURMAN,
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WILLIAM D. DRISCOLL, as Collector of Internal Revenue.

PETITION FOR RECONSIDERATION of the PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the United States Supreme Court:

Comes now the above named Petitioner by its Attorneys and prays for reconsideration of its Petition for Writ of Certiorari herein, which was denied October 12, 1942.

QUESTION PRESENTED.

The Circuit Court of Appeals held in the above case that any "organization, whether incorporated or not, which provides an opportunity for its members to meet each other at mealtimes and partake together of food and drink with

conversation on whatever subject pleases them is a social organization" (R. 330), and taxable under Section 501 of the Revenue Act of 1926, as amended by Section 413, Rev. Act 1928.

Clubs are not taxable under the law just because they serve luncheon. The Commissioner's Regulations which have interpreted the above Section of the law since 1918 provides that a Club is not taxable if "its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, Chamber of Commerce, commercial club, trade organization or the like, merely because it has incidental soial features, * * *." (Section 101.25 of Treasury Regulations 43.)

REASONS WHY THIS PETITION FOR RECONSIDERATION OF WRIT OF CERTIORARI SHOULD BE GRANTED.

1.—The U. S. Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with eight U. S. District Courts, two U. S. Circuit Courts of Appeals, its own Circuit, and the Court of Claims affecting a substantial proportion of over fifty Club cases that have been litigated. (See Exhibit "A" attached.)

2.—The decision is a novel interpretation of an important Federal question, in a way probably in conflict with applicable decisions of this Court, which results in confusion in the administration of the Revenue Laws which should be clarified and settled by this Court.

3.—A reconsideration of the Petition for Writ of Certiorari is prayed because the Commissioner upon the authority of the decision of the U. S. Court of Ap-

peals for the Third Circuit is in effect reversing the interpretation of the law and the decisions of the Court of Claims and a number of the U. S. District and Circuit Courts of Appeals (see Exhibits B, C, D, E attached, showing typical action by the Commissioner, as a result of this conflicting decision).

4.—Because of the utter confusion caused by the conflict of the decision of the U. S. Court of Appeals for the Third Circuit with itself (see Union Club case, 99 F. (2d) 259 (C. C. A. 3) 1938) (R. 330) and other numerous Courts referred to above (see Ex. A, attached) much litigation will be stimulated, at enormous cost of money and time both to the taxpayer and the Government.

Wherefore, it is earnestly prayed that this Court reconsider the Petition for Writ of Certiorari and grant the same.

Respectfully submitted,

GEORGE B. FURMAN,
1316 L St., N. W.,
Washington, D. C.

PAUL ARMITAGE,
EDWARD HOLLOWAY,
New York, N. Y.

Counsel for Petitioner.

George B. Furman, Counsel for the above named Petitioner, does hereby certify that the foregoing Petition is presented in good faith and not for delay.

GEORGE B. FURMAN,
Counsel for Petitioner.

EXHIBIT "A".

LIST OF LUNCHEON CLUBS HELD BY THE FOLLOWING COURTS TO BE NON-SOCIAL IN CONFLICT WITH U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT.

U. S. District Courts:

City Club of Cleveland, 15 A. F. T. R. 557.
City Club of St. Louis, 24 F. (2d) 743.
Los Angeles City Club, 44 F. (2d) 239.
Squantum Association, 7 F. Supp. 815.
Tidwell v. *Anderson*, 4 F. Supp. 789.
Two Thirty Three Club, 2 F. Supp. 963.
Engineers Club of Phila., 19 A. F. T. R. 1358.
Krug v. *Rasquin* (*Bakers Club*), 21 F. Supp. 866.

U. S. Circuit Courts of Appeals:

Squantum Association, 77 F. (2d) 918 (C. C. A. 1).
Tidwell v. *Anderson*, 72 F .(2d) 684 (C. C. A. 2).
Union Club of Pittsburgh, Pa., 99 F. (2d) 259 (C. C. A. 3).

U. S. Court of Claims:

Aldine Club v. *U. S.*, 65 Ct. Cl. 315.
Builders' Club of Chicago v. *U. S.*, 74 Ct. Cl. 595.
Bankers Club of America Inc. v. *U. S.*, 69 Ct. Cl. 121.
Century Club v. *U. S.*, 12 F. Supp. 617.
Chemists Club v. *U. S.*, 64 Ct. Cl. 156.
The Cordon v. *U. S.*, 71 Ct. Cl. 496.
Cosmos Club v. *U. S.*, 70 Ct. Cl. 366.
Houston Club v. *U. S.*, 74 Ct. Cl. 640.
Washington Club v. *U. S.*, 69 Ct. Cl. 621.
Whitehall Lunch Club v. *U. S.*, 80 Ct. Cl. 350.

EXHIBIT "B".

TREASURY DEPARTMENT

Internal Revenue Service
New York, N. Y.

June 29, 1942

In Reply Refer to

Miscellaneous Tax Special Squads
Room 1003, Chanin Building
122 East 42nd Street
New York, New York

Mr. Robert H. Patchin, Secretary
India House, Incorporated
1 Hanover Square
New York, New York

Sir:

Attached hereto is a report of an examination of the books and records of India House, Incorporated, for the period June 1, 1938 to May 31, 1942, in which the examining officers recommend assessment for failure to collect and pay tax due on initiation fees and dues.

Please be advised that the taxpayers are privileged to protest to or request a conference at the Bureau with regard to the proposed assessment, and that in doing so they should communicate with the Commissioner of Internal Revenue, attention MT:M, Washington, D. C.

Yours very truly,

SAMUEL LITWIN,
Internal Revenue Agent.

Enc.

June 29, 1942

Deputy Commissioner
Miscellaneous Tax Unit
Bureau of Internal Revenue
Washington, D. C.

In Re: India House, Incorporated
1 Hanover Square
New York, New York
Second New York District

Sir:

Pursuant to instructions received from Internal Revenue Agent Samuel Litwin, an examination has been made for the period June 1, 1938 to May 31, 1942, of the books and records of the above named club, to determine liability of its members for tax on dues and initiation fees.

This examination disclosed that for the period under review the club had not collected, and the members had not paid tax on dues and initiation fees as required by the provisions of section 1710(a)(1) and (2) as amended, in the aggregate amount of $40,180.50. A schedule has therefore been prepared and attached hereto (exhibit "A") showing the members' names and addresses, dates of payment and amounts of dues or initiation fees paid, and the tax properly payable thereon. It is recommended that assessment be entered against the individuals listed in the amounts so shown.

* * * * * * * * * *

It is our understanding and contention that a luncheon club is, per se, a social club. The bringing together of a rigidly restricted membership in quarters maintained by them for the purpose of congregating for social intercourse would seem to bring the organization within the purview of the Code even though the means employed are daily luncheons rather than formal dinners at less frequent periods.

In the instant case there is no contention that the daily luncheons are subordinate and merely incidental to a different and predominant purpose. While the membership body is composed of business and professional men, there is no record of its having been addressed by speakers on the subjects of business or foreign commerce, nor is there maintained a forum for the open discussion of these and other subjects. It would rather appear that the members resort

to the club at mid-day as a relaxation from business in the company of their carefully selected fellows. Social contacts and intercourse are the desired ends; the luncheons are the means to those ends. This being so, we believe that India House, Incorporated, falls well within the scope of the decision of the United States Circuit Court of Appeals for the Third District, in the case of the Duquesne Club.

It is therefore recommended that assessment be entered under the provisions of section 1710 of the Internal Revenue Code against the members named and in the amounts set forth in the attached exhibit "A."

* * * * * * * * * *

Because of the large number of individual taxpayers concerned in the proposed assessment as shown in exhibit "A" attached, it is inexpedient to communicate with them severally or to obtain from them their agreements in writing for the assessment recommended. In lieu of such action, there has been submitted to Mr. Robert H. Patchin, secretary of India House, Incorporated, at 1 Hanover Square, New York, New York, a copy of this report together with exhibit "A", showing individual taxpayers and the amounts involved. Mr. Patchin has been advised that the taxpayers are privileged to submit a protest to or request a conference at the Bureau with regard to the proposed assessment, and that in so doing they should communicate with the Commissioner of Internal Revenue, attention MT:M, Washington, D. C.

A copy of this report has also been forwarded by mail to the Collector of Internal Revenue, Second New York District Custom House, New York, New York.

Respectfully,

HARRY P. HIGGINS,
General Deputy Collector.
HARRY N. CRITTENDEN,
General Deputy Collector.

INDIA HOUSE, INCORPORATED

Hanover Square
New York, N. Y.

July 6, 1942.

To the Members of India House:

The Secretary of India House has received a letter from Mr. Samuel Litwin, Internal Revenue Agent in charge of Miscellaneous Tax Special Squads of the Internal Revenue Service of the Treasury Department, whose office is at 122 East 42nd Street, New York City, enclosing a copy of a report made to the Deputy Commissioner of Internal Revenue in charge of the Miscellaneous Tax Unit by two General Deputy Collectors, in which it is recommended that assessments be entered under the provisions of § 1710 of the Internal Revenue Code against the members of India House, Inc. in the amounts set forth in an attached schedule, covering dues paid between June 1, 1938 and May 31, 1942.

§ 1710 of the Code levies a tax of 11 per cent (10% prior to 1941) on the dues and initiation fees paid by members to any social, athletic or sporting club or organization if the dues or membership fees of an active resident annual member exceed a specified amount.

Prior to 1928, India House collected from its members and paid over to the Government a similar tax on dues and initiation fees under a provision of the then law, practically identical with the section of the Code above referred to. But in 1928, the club was successful in obtaining a refund of the sums so paid between July 29, 1924 and June 23, 1928, after satisfying the Commissioner that it was not a social, athletic or sporting club within the meaning of the statute.

Since 1928 there has been no attempt to collect such a tax. The above mentioned report and recommendation that assessments be entered against the members of India House results from a recent ruling of the U. S. Circuit Court for the 3rd Circuit in the case of *Duquesne Club* v. *Bell* (127 F. (2d) 363), in which that Court said:

> "We are prepared to say that an organization, whether incorporated or not, which provides an opportunity for its members to meet each other at mealtimes

and partake together of food and drink with conversation on whatever subject pleases them is a social organization. This assumes, of course, an organization the main purpose of which, as is true here, is not other than to provide such an opportunity."

The report states that India House falls within the scope of this decision. It also states that because of the large number of members concerned in the proposed assessment, it is inexpedient to communicate with them severally or to obtain from them their agreements in writing for the assessment recommended, and in lieu thereof, a copy of the report has been sent to the Secretary of India House.

Mr. Litwin's letter states that any member is privileged to protest to or request a conference at the Bureau with regard to the proposed assessment, and that in so doing he should communicate with the Commissioner of Internal Revenue, attention MT:M, Washington, D. C. We understand that such action should be taken not later than July 9th. The amount involved is relatively small (between $1.00 and $116.00) in the case of any individual and probably would not justify the expense of litigation in the case of any one member, but the total for 805 members is $40,180.50.

In view of the necessity for immediate action, the Executive Committee of India House has arranged to have a member request a conference at Mr. Litwin's office with regard to the proposed assessment, and will provide counsel to represent such member and present the facts.

LEIGH C. PALMER,
Vice-President.

EXHIBIT "C".

THE WALL STREET CLUB

40 Wall Street
New York, N. Y.

July 1, 1942

The Club has been notified by the Treasury Department that the Federal tax on dues is to be collected from members and paid by the Club to the Collector of Internal Revenue. As you know, the Board of Governors has consistently taken the position that your Club is a business, not a social club, within the meaning of the statute, and that the dues are, therefore, exempt from Federal tax. However, the United States Circuit Court of Appeals for the Third Circuit has recently held that the Duquesne Club of Pittsburgh is a social club and that its members are subject to the dues tax. We are advised by counsel for the Duquesne Club that a petition will be filed with the United States Supreme Court to review the Circuit Court decision.

In view of the demand from the Treasury Department, the Board is advised by counsel that members should pay the 11% tax on dues, which appears on this bill. Payment of tax will be made under protest, or the amount thereof held pending consultation and decision by the tax authorities.

The Board of Governors is now taking advice of counsel as to the action which should be taken to establish, if possible, tax exemption for your Club. If the tax is refunded, repayment will be made to the members. The amount of any tax finally paid, is, of course, deductible from the gross income of the individual.

EXHIBIT "D."

DOWN TOWN ASSOCIATION
60 Pine Street, New York

June 25, 1942.

To the Members:

The United States Bureau of Internal Revenue has just advised the Club that in view of the recent decision concerning the Duquesne Club of Pittsburgh, the dues and initiation fees payable by members are subject to the 11 per cent tax under United States Internal Revenue Code, Section 1710.

The Club is taking steps to contest this tax; however, in view of the above ruling we are obliged, pending the decision of the matter, to collect the tax on dues payable on or after May 1, 1942, and on initiation fees.

EXHIBIT "E".

THE BANKERS CLUB OF AMERICA
38th, 39th and 40th Floors, Equitable Building
120 Broadway—New York, N. Y.

NOTICE TO MEMBERS

As a result of a decision of the United States Circuit Court of Appeals for the Third Circuit holding that the Duquesne Club is a social one, the Treasury Department has notified us that a tax of 11% will be imposed on the dues of members of our club and of similar luncheon clubs. For this reason we are obliged to include the charge on the attached statement for dues from July 1.

We shall, of course, make objections to the payment of this tax.